

**OHIO STATE BAR ASSOCIATION TAXATION COMMITTEE**  
**Sales/Use Tax Subcommittee Report**  
**September 24, 2021**

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**I. EXEMPTIONS**

Transportation for Hire:

*N.A.T. Transp., Inc. v. McClain*, Slip Opinion No. 2021-Ohio-1374. A transporter of waste (residential and commercial) to landfills possessed PUCO certificate as a “*for-hire*” carrier, receiving payment for the transportation. The sole issue was whether the waste was property “*belonging to others*”.

The Court first considered its prior decision in *Rumpke Container Serv., Inc. v. Zaino*, 94 Ohio St.3d 304, 762 N.E.2d 995 (2002) where exemption was denied because the waste was determined to not be property belonging to others. Here, the Court distinguished *Rumpke* because it owned the landfill and the customer did not dictate the destination of the waste. *Rumpke* was characterized as providing a waste disposal service (not “*for-hire*” carriage).

The Court then held that N.A.T. was entitled to exemption, but only with respect to commercial waste since the customer controlled its disposition/destination. Due to this fact, commercial waste customers (versus residential customers) continued to exercise “*powers of ownership*” over the waste, making it their property. Accordingly, exemption was available for Peterbilt trucks that primarily carried commercial waste.

Planning:

1. Confirm contract language supports customer control over disposition/destination of property being transported; and
2. If any taxable carriage, must support primary portion used in an exempt manner.

## II. PROCEDURE

### Responsible Party Liability:

*Pastorek v. McClain*, Ohio BTA Case No. 2020-415 (March 8, 2021). Taxpayer assessed as responsible party asserted that his criminal charge for failing to pay sales tax included a plea agreement to pay restitution to the State (but only the tax and not penalty, interest, fees and collection costs) so that such agreement constituted “*full payment of penalties and interest*”. However, the BTA held such restitution does not control whether one is liable as a responsible party. The individual was still a responsible party liable for the underlying assessment, which was the entire liability.

## III. MISCELLANEOUS

### Unconstitutional Tax on Speech:

*Lamar Advantage GP Co., LLC v. Cincinnati*, Ohio S. Ct., Dkt No. 2020-0931 (September 16, 2021). Cincinnati imposed a tax on only off-site outdoor advertising signs (not those pertaining to a site’s business) so that the burden fell predominantly on two billboard operators. The Supreme Court held the excise tax was unconstitutional.

The tax did not survive the strict scrutiny standard relevant to a selective tax impermissibly infringing on the advertiser’s rights to free speech and free press protected by the First Amendment of the U.S. Constitution. It was a selective/discriminatory tax (versus generally applicable tax) imposed on protected First Amendment activities of only the two billboard operators that did not further a compelling government interest tailored to achieve that interest. Although the City had an interest in raising tax money, there were more acceptable sources of revenue.

## IV. LEGISLATION

### Ohio Budget Bill (H.B. 110) (changes effective 10/1/2021)

- A. **Repeal of Tax on employment services and employment placement services** – The repeal removes the tax burden of providing staff to businesses returning to full operation post-pandemic, and may curb litigation over employment services issues that have repeatedly made their way to the Ohio Supreme Court over the years.
- B. **Reinstatement of exemption for metal bullion and investment coins** – A similar exemption was repealed as of October 1, 2019 and has now been reinstated.
- C. **Refund Procedure** - ORC 5703.70 describes general refund application and processing procedures for most Ohio taxes. Current law requires the Ohio Tax Commissioner to notify a refund applicant if the amount of the refund is determined to be less than that requested. The applicant then has 60 days to provide additional information in support of the refund claim, request a hearing, or both. After receiving the additional information or holding a hearing, the Ohio Tax Commissioner must issue a final determination on the refund claim, which is subject to appeal to the Ohio Board of Tax Appeals. HB 110 amends ORC 5703.70 to allow the Ohio Tax Commissioner to adjust the amount of a state tax refund multiple times before issuing a final refund determination.

## V. OHIO ADMINISTRATIVE CODE

### OAC 5703-9-15 Sales and use tax; coupons, coupon books, and gift cards

Effective August 17, 2021, Ohio rescinded the previous rule regarding sales tax calculations on purchases made with gift cards and replaced it with a modified version. If a gift card is issued as part of an awards, loyalty, or promotional program, then sales tax is calculated on the price *after* the gift card is redeemed. If the vendor's recordkeeping system does not indicate whether the gift card was issued as part of a loyalty program, sales tax is calculated on the full price before the gift card is applied. Additionally, if a gift card issued as part of a loyalty program is used to purchase taxable and nontaxable items, the gift card will proportionally reduce the prices of taxable and nontaxable items.

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